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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 286

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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1. The Commission (Br. in Opp. pp. 7-8) expressly concedes that the substantive question presented in the instant case is "a recurring one of general interest and importance in the regulatory community; and the present case represents a change in the thinking of the

Federal Power Commission on the subject." Despite these concessions, the Commission (Br. in Opp. p. 8) urges that the case does not warrant review by this Court and in this connection, the Commission (*Id.* fn. 3) undertakes to distinguish "[t]he issue here * * * from that in No. 127, this Term, *Federal Power Commission* v. *United Gas Pipe Line Company, et al.*, in which certiorari has been granted to review another Fifth Circuit decision involving the treatment of tax reductions for rate purposes."

The Commission's proffered distinction, however, is invalid. The Commission (Br. in Opp. p. 8, fn. 3) claims that *United Gas* involves a question of Commission power whereas "[n]o such question of power is presented here." This argument confuses the Commission's position herein with the question presented. To be sure, the Commission *argues* in this case that it has power and discretion to do what it did. But the question of the Commission's power is the very question on which review here is sought. The fact that the Commission argues that it has the power does not make it so.

The question presented by the Petition in this case, like that in *United Gas,* directly places in issue the power of the Commission, *viz.,* whether the Commission has power to require natural gas companies subject to its jurisdiction to pass through the particular Federal income tax benefits involved in the form of reduced rates. Significantly, the Commission's position in *United Gas* is the same as its position in the present case, namely, that the rate treatment to be accorded the particular Federal income tax benefit involved has been left by Congress to its administrative discretion.

It is, thus, apparent that the only difference between the two cases in this respect is that in *United Gas* the Court of Appeals rejected the Commission's position and held that the Commission lacked power to require the pass-through of those particular tax benefits whereas in the instant case, the court below agreed with the Commission in its ruling requiring flow-through of liberalized tax depreciation. Accordingly, since review by this Court obviously does not turn upon whether the Commission has won or lost in the courts below and since the question presented here, affecting as it does virtually the entire natural gas pipeline industry, is plainly of far greater importance and interest than that in *United Gas* (compare F.P.C. Petition in No. 127 at pp. 14-16),[1] the granting of certiorari in *United Gas a fortiori* requires that certiorari be also granted here.

2. In urging against certiorari here, the Commission (Br. in Opp. p. 8; see also Br. in Opp. of Tennessee Valley Municipal Gas Association [Association][2] at pp. 6, 8) places heavy reliance upon this Court's denial

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[1] The importance of the holding below has been accentuated by the Commission's Opinion No. 497 in *Midwestern Gas Transmission Company, et al.*, RP61-19, *et al.* (Reopened), issued on July 15, 1966, subsequent to the filing of the petition herein. In that case, the Commission extended its holding in the instant case to companies which had changed from liberalized depreciation to straight-line depreciation for Federal income tax purposes as a consequence of the Commission's "about face" herein. The Commission there held that it was an abuse of discretion for these companies to have changed to straight-line depreciation and required them to reduce their rates as if they were still using liberalized depreciation.

[2] We answer the arguments of the Association in this Reply Brief not because we believe that its Motion to be added as a respondent should be granted, but because we probably will not have a further opportunity to reply should the Court grant the Association's Motion.

of certiorari in *El Paso*[3] even though the Court of Appeals there had *affirmed* the Commission's normalization of liberalized depreciation in fixing the pipeline company's rates. In any event, it is well established, of course, that a denial of certiorari does not constitute a decision on the merits. Moreover, contrary to the Commission's arguments both here (Br. in Opp. pp. 11-12) and in its opposition in *El Paso* (No. 599, Oct. Term 1960 at pp. 7, 11-12) it is clear that the Fifth Circuit's approval in *El Paso* of normalization was in the context of an unbroken line of Commission rulings applying normalization in recognition of the Congressional mandate in enacting Section 167. Also, it is clear from the *El Paso* decision that the Court's approval of normalization was not based on a deference to administrative discretion.

In contrast, the Fifth Circuit's *acceptance* of flow-through in this case runs wholly counter to its *affirmance* of normalization in *El Paso*. Its action in this case was taken against the background of the Commission's repudiation of its prior consistent precedents on which many pipline companies had relied in electing to use liberalized depreciation coupled with a 180 degree about-face by the Commission as to the factual bases for its conclusion.

Moreover, like the Court of Appeals in *El Paso*, the District of Columbia Circuit's decision in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 316 F. 2d 659 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 881 (1963) recognized normalization as being required

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[3] *El Paso Natural Gas Co.* v. *Federal Power Commission*, 281 F. 2d 567 (5th Cir. 1960), *cert. denied, sub. nom. People of the State of California, et al.* v. *Federal Power Commission*, No. 599, Oct. Term 1960, 366 U.S. 912 (1961).

by the Congressional purpose behind Section 167. Indeed, as shown in our Petition (at pp. 11-14), the *Panhandle* decision is in conflict with the Fifth Circuit's decision below.

Finally, the Commission's opposition to certiorari in *El Paso* was not limited to arguing administrative discretion. Instead, it made several other arguments which may well have constituted the basis for this Court's denial of certiorari in *El Paso*.[4] In view of this, it is significant that several of the Commission's arguments in *El Paso* directly contradict the Commission's critical contentions in the instant proceeding. For example, in seeking to demonstrate the wisdom of its "discretionary" action, the Commission *here* argues (Br. in Opp. pp. 10-11):

> "For the natural gas industry in general, and Alabama-Tennessee in particular, the Commission found that a pattern of growth would continue for the foreseeable future (R. 144-146), and accordingly that liberalized tax depreciation would consistently exceed straight-line depreciation, resulting in consistently lower taxes. In these circumstances, to permit normalization is to require the ratepayers to provide funds against a contingency only remotely likely to occur. To be sure, the Commission's conclusion that the use of liberalized depreciation results in tax savings, rather than deferrals, involves some projection into the future —but no more than would the conclusion that deferrals result. Indeed, as the court below pointed out (Pet. App. 33a), 'the case for normalization

[4] The Commission's opposition in *El Paso* improperly characterized the issue as "a relatively narrow * * * accounting problem" (p. 7) involving a "* * * choice among competing accounting systems" (p. 11). Its opposition here (at pp. 7-8) recognizes that the issue involves far more than just accounting.

> requires more speculation than the case for flow-through. And it is at the expense of consumers'."

In contrast, the Commission claimed in its *El Paso* opposition in support of *normalization* (at pp. 14-15) that:

> "* * * Petitioners' assumptions of a continual plant growth and a continuously expanding investment in depreciable property, *i.e.*, plant additions exceeding retirements, are at best largely speculative and conjectural. It was within the Commission's discretion to decline to make these assumptions. On the other hand, it is known, and petitioners must concede, that as the tax law now stands, higher deductions and lower taxes prevail only during the early depreciable life of a property unit, whereas lower deductions will prevail during its later life. Petitioners therefore do not, and cannot, show that the ultimate net result will be an outright tax saving."[5]

Thus, the Commission's present position in favor of flow-through, as to factual matters, is grounded primarily on conclusions directly contradictory to those espoused by the Commission when it was justifying normalization in *El Paso*.

3. In view of the nature of the Commission's findings in support of flow-through, and in view of the conceded widespread importance of its decision to the entire natural gas pipeline industry (Br. in Opp. p. 8), there is a particular need to assure that such a drastic reversal of prior findings be made only on a comprehensive record in which all interested parties have had the requisite opportunities required by due process to present evidence and cross-examine.

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[5] See also the Commission's *El Paso* opposition at page 16.

Yet, neither the Commission nor the Association even attempt to contend that the Commission's findings here are based on such a record. Nor do they deny that the Commission undertook to make its new and contradictory findings on a bob-tailed record supplemented by collateral materials purportedly subject to administrative notice. Instead, they retreat to the claim, founded on strict technicalities, that Petitioner had not taken proper steps either to present evidence or to challenge the Commission's findings based on these extra-record materials.

Thus, the Commission argues (Br. in Opp. p. 13), that "* * * [the] issue had been timely raised by the intervening municipalities in the original hearing and petitioner could then have attempted to rebut the evidence introduced to support the claim that the Commission should change from normalization to flow-through" (see also Association Br. in Opp. p. 13). This argument ignores the express recognition by the court below—that (Pet. App. pp. 38a-39a):

> "*At the time of the hearing* it was reasonable for the petitioner to rely on the Commission's then well-established policy of allowing normalization. It was not unreasonable for the petitioner to assume that the Commission's failure to offer witnesses on flow-through normalization [sic] indicated that the Commission had no intention to reverse itself" [emphasis supplied].

Further, the Commission argues (Br. in Opp. pp. 13-14; see also Association Br. in Opp. p. 14) that after the Commission severed the liberalized depreciation issue, Petitioner did not request to reopen the record and that it did not object to the Commission's reliance "on secondary sources for factual determinations."

Again, this argument ignores the clear fact that the Commission fully understood Petitioner's pleadings filed subsequent to such severance, as requesting *just* such a reopening and as objecting to *just* such reliance upon collateral materials. The Commission's opinion on rehearing explicitly notes that (R. 203):

> "Alabama-Tennessee * * * contend[s] that the Commission's decision herein was based on an insufficient record; on matters *de hors* the record; and *on findings contrary to facts which could have been established if another opportunity to present pertinent evidence was afforded*" [emphasis supplied].

Since the Commission was then fully aware of the scope of Petitioner's position *when it denied rehearing*, the Commission's efforts *now* (Br. in Opp. p. 14) to vindicate its action on the ground that Petitioner had purportedly failed to invoke certain Commission rules is obviously contrived and hypertechnical.

The arguments advanced by the Commission and the Association to justify the Commission's procedure herein, thus, in no way undercut the comment in our Petition (at pp. 20-21) that "the Commission's 'about face' was based on procedure which is not merely 'singularly eccentric,' but which operated effectively to deny a fair hearing to Petitioner and the natural gas industry in general." This is particularly so in light of the Commission's unmistakable implication (Br. in Opp. p. 14) that as far as it is concerned, its ruling in the instant case constitutes a determination of the flow-through v. normalization question applicable generally to the natural gas industry subject to its jurisdiction with sole permissible exceptions thereto being those companies which "present evidence showing that fac-

tual differences between their cases and Alabama-Tennessee's justify their continuing to use the normalization method."

CONCLUSION

For the foregoing reasons as well as those set out in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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